



**Advisory Council on the Status of Women
Conseil consultatif sur la condition de la femme**

**BRINGING ALL OF NEW BRUNSWICK LAWS INTO
CONFORMITY WITH SECTION 15
OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

**A presentation by the
New Brunswick Advisory Council on the Status of Women**

March 1985

The New Brunswick Advisory Council on the Status of Women thanks you for this opportunity to discuss with you its expectations of action by the Department of Justice to bring New Brunswick's laws, regulations, policies and programs in conformity with section 15 of the Charter of Rights and Freedoms.

When this section comes into force, sex discrimination will be unconstitutional - illegal. As of April 17, 1985, women are equal before and under the law and have the right to the equal protection and benefit of the law. The intent, formulation, application and effect of all laws, regulations, policies and programs must result in de facto equality between women and men. The spirit of equality must prevail; it must be translated into reality, into all practical affairs.

To address in both policy and action the issue of guaranteeing equality between the sexes in New Brunswick and to attain and ensure this equality as guaranteed since 1982 by section 28, and from April 17, 1985 by section 15, we believe that the province must adopt basic principles in accordance with the Charter:

1. that the basic unit of society is the individual;
2. that women and men are equal;
3. that marital status:
 - i) does not affect or alter in any way a person's individuality,
 - ii) does not abrogate, alter or increase a person's rights, freedoms and privileges as an individual.

Three steps are then required by the government of New Brunswick to bring New Brunswick's laws regulations, policies and programs in line with section 15:

1. the elimination of all sex discrimination from the intent, formulation, application and effect of all New Brunswick's laws, regulations, policies and programs;

2. the creation of laws, regulations, policies and programs which will result in de facto equality between women and men in all areas of society which are governed, regulated or otherwise overseen by the Crown.

3. the carrying through of actions from both steps 1 and 2 to ensure that the spirit of section 15 of the Charter is embodied in the intent, formulation, application and effect of all New Brunswick's laws, regulations, policies and programs. The spirit of section 15 of the Charter guarantees that each individual regardless of her or his race, national or ethnic origin, colour, religion, sex, age or mental or physical disability to live in and be treated with human dignity.

STEP ONE

I. We suggest that the first step begin with the province declaring an equality statute (see Appendix for a model) which would take precedence over all other statutes. This action would further commit the province in principle to both the spirit and stipulations of The Charter of Rights and Freedoms. It would also commit the government to swift action in guaranteeing that the province's laws, regulations, policies and programs would conform with both the Charter's spirit and its stipulations.

The basic principles as enumerated above would be included in this paramount law. Certain specific types of discrimination would be noted as examples of discrimination on the basis of sex. For instance, discrimination on the basis of pregnancy would be deemed discrimination on the basis of sex.

This paramount statute would abolish all the common law principles, concepts and rights which discriminate against persons as individuals, i.e. on the basis of sex and on the basis of marital status:

1. unity of legal personality/and interspousal immunity
2. harbouring
3. enticement
4. criminal conversation
5. domicile.

We expect that this paramount statute would be adopted and proclaimed in the Legislative Assembly's first sitting of 1985.

II. Either at the end of this statute or in an omnibus bill brought in concurrently the following statutes, must be cleansed of their discriminatory clauses. This is not an exclusive list.

1. Those statutes which discriminate on the basis of marital status.

Numerous statutes discriminate on the basis of marital status. This form of discrimination is unacceptable under the Charter as each person is an individual "equal before and under the law and has the right to the equal protection and equal benefit of the law". It would seem that the concept of unity of legal personality could not be tolerated as of April 17, 1985. This traditional unity has given the male party of the legal unity certain special privileges (e.g. with regard to loss of consortium) and has burdened the female party of the legal unity with numerous legal disabilities (e.g. with regard to naming children), as well as curbing the freedoms of both parties in other matters.

The concept of unity of legal personality is applied in numerous statutes and must be removed from them in the first sitting of the Legislative Assembly of 1985.

a) The Married Woman's Property Act

Observations:

- The Act's name is sexist as it refers to the married woman only. It is archaic as it underlines the need to return rights to women that marriage would otherwise remove from them, rights that women as individuals entering interpersonal relationships and contracts should never lose in the first place.
- Section 6 is particularly offensive. It involves the unacceptable doctrine of unity of legal personality, disallowing one spouse to sue the other for tort, except for a tort related to property.

Recommendations:

- Sections 2 to 6 should be repealed.
- A section reaffirming that married persons remain individuals upon marriage may be added to the Marital Property Act. They remain, however, individuals who have entered into an economic partnership. Such a section would guarantee that each partner in a marital relationship:

- a) continues to be liable in respect of any tort committed, contract entered into, or debt or obligation incurred by that partner before marriage,

- b) is capable of making herself or himself, and being made, liable in respect of any contract, debt or obligation,
- c) is capable of acquiring, holding and disposing of any property,
- d) is capable of suing and being sued, either in tort, contract or otherwise,
- e) is subject to the enforcement of judgments and orders, and
- f) is capable of acting in any fiduciary or representative capacity,

in all respects as an unmarried person.

b) The Insurance Act

Observations:

- Subparagraph 239 (b)(i) of this Act involves the intertwined principles of unity of legal personality and intra-family immunity, thereby barring spouses and children coverage under liability policies; both principles contravene our proposed governing principle that the individual is the basic unit of society.

Recommendations:

- That subparagraph 239 (b)(i) be repealed and a provision be added to the Act to disallow insurance companies from contracting out of liability so as to defeat the effect of the repeal of subparagraph 239 (b)(i).

c) The Contributory Negligence Act

Observations:

- Section 4 of this Act involves the principle of unity of legal personality with the doctrine of intra-spousal immunity because it disallows the recovery of damages, contributions or indemnity for the portion of damage caused by a spouse who causes her or his marital partner bodily injury or death.

Recommendations:

- That section 4 be repealed.

d) The Family Services Act

Observations:

- The first principle of this Act states that "the family exists as the basic unit of society, and its well-being is inseparable from the common well-being".

In fact, however, society is composed of individuals, who may or may not have various familial, social, or social-contractual relationships with other individuals.

Recommendations:

- That the first principle of the Act be repealed and replaced by the principle that "the individual exists as the basic unit of society and her or his well-being is inseparable from the common well-being".

2. Those statutes which discriminate on the basis of sex and marital status

Some acts discriminate on the basis of sex and marital status. We note here the Vital Statistics Act and the Change of Name Act. Please refer to our brief On Naming Children and Changing Names for our observations on their discriminatory sections and for our recommendations for the adoption of basic egalitarian principles and the formulation of nondiscriminatory clauses for these Acts. We urge the swift amendment of these Acts since they contravene section 15 of The Charter of Rights and Freedoms.

This short list does not preclude the existence of other acts which may also discriminate on the basis of sex and marital status. Such acts must be amended swiftly.

3. Those statutes which discriminate on the basis of sex

The Insurance Act

Observations:

- Subsection 82(7) discriminates against women on the basis of sex, stipulating as it does that the valuation of annuity contracts "shall be the British Officers' Select Life Annuity Table, 1893, male or female according to the sex of the nominee".
- The effect of this discriminatory section is to have insurance companies pay women smaller annuities than men. This action contributes directly to the poverty and hardship of many elderly women.

Recommendations:

- That subsection 82(7) of the Insurance Act be repealed;
- That the Insurance Act (and if necessary other relevant acts, dealing, for instance, with pensions) stipulate that insurance companies use unisex mortality tables.

4. The Human Rights Code

The exercise of eliminating sex discrimination from present statutes must include the strengthening of the Human Rights Code and the revamping of the mandate and powers of its administering body the New Brunswick Human Rights Commission.

a) the strengthening of the Code

- i) The Charter of Rights and Freedoms is meant to guarantee that a government will not discriminate against an individual. We therefore need a strong provincial Human Rights Code which not only prohibits a public or private institution from discriminating against an individual (as the Code now stands) but which also prohibits one individual from discriminating against another individual.
- ii) The amendments to the Code must include the removal of sexist language in both its English and French versions.
- iii) The Code must be brought in line with section 15 of The Charter of Rights and Freedoms. This action would include adding mental disability as a state against which no discrimination is to be allowed.

b) revamping the mandate and powers of the New Brunswick Human Rights Commission

i) at present the Commission has limited powers:

- it has no power to investigate and bring action on its own; for example, it cannot investigate a workplace unless a complaint has been made and found worthy of investigation;
- it has limited powers in bringing action against a party found to be in violation of the Code. At present the Commission may order a fine for a violation of the Code once a complaint has been laid and found valid, but it can take no other measures to stop the discrimination. Moreover, if the fine is not paid the Commission has no powers against the violator other than through the Minister responsible for the Commission. The Minister in turn has limited powers, being able it would seem to bring the violator to court only for refusal to pay the original fine and not for the actual discrimination.

ii) The Commission should have the clearly defined power:

- to recommend changes in government statutes, regulations, policies or programs that are found to be discriminatory, and,
- to recommend, where needed, legislation, regulations, policies or programs to prevent discrimination or to ensure the elimination of discrimination or to create equality, for instance between women and men.

iii) As we believe that the Human Rights Code should guarantee equality in all facets of our society, we believe that the Human Rights Commission should be responsible to the Legislative Assembly rather than responsible to a particular minister (the Minister of Labour and Human Resources). The Commission should thus report directly to the Legislative Assembly.

5. Those statutes which have discriminatory language

All sexist language must be eliminated from New Brunswick statutes.

STEP TWO

Removing discrimination on the basis of sex and marital status from the intent, formulation, application and effect of existing laws is only the beginning of the reform process. Concurrent with this first step must be the creation of laws, regulations, policies and programs which will result in de facto equality between women and men in all areas of society which are governed, regulated or otherwise overseen by the Crown.

Many issues must be examined, many problems addressed and redressed. We propose a preliminary list of issues which should take priority.

The questions at issue include achieving de facto equality between women and men in:

- the economy and the work force
- the workplace
- the decision-making bodies
- education and training programs
- the judicial system.

Measures to ensure equality between women and men in these areas include:

- equal pay for work of equal value (see our brief entitled the same);
- readily available, affordable, high quality day care (see our brief Early Childhood Development Services: Meeting Needs through Options);
- affirmative action programs, for example:
 - in employment (hiring, promotion and training practices)
 - in education and training;
- nonsexist education and equality of results (see our briefs Plan of Action and the Status of Women in Education and Plan of Action and the Status of Women in Community Colleges);
- just and equitable formulation, application and administration of pensions (see our brief Pensions, Poverty and Women).

STEP THREE

Concurrent with steps 1 and 2, the New Brunswick government must undertake a third reform process. New Brunswick must go beyond guaranteeing the letter of the law as written in section 15 to guaranteeing the spirit and intent of the law. All present and future laws, regulations, policies and programs of New Brunswick must embody the principle that each individual regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (as well as marital status) has the right to live in and be treated with human dignity in all aspects of New Brunswick life as governed, regulated or otherwise overseen by the Crown. Equality in all its forms and interpretations embodies the concept of human dignity. A society cannot have one without the other.

As in Step 2, we propose a preliminary list of issues which should take priority.

Women and men must be guaranteed the right to be treated with human dignity by:

- the health system
- the criminal justice system
- the judicial system
- the law enforcement system
- the social service system
- municipal authorities
- and all other federal legislation administered by the province or provincial legislation administered by the province itself.

Specific issues in question include:

- the availability of reproductive health services (see our presentation Health Care: Women's Concerns);
- social services and social service recipients (see our presentation Income Security and Community Services: Reform with Women in Mind);
- pornography (see our brief Confronting Pornography);
- spousal assault (see our briefs Beyond the Crisis: Toward Solving the Problem of Wife Assault, and In a Just Society);
- divorce;
- sexual assault;
- sexual harassment.

CONCLUSION

The Charter of Rights and Freedoms binds New Brunswick to guarantee equality for women before and under the law and to equal protection and equal benefit of the law and further to guarantee equally to females and males the rights and freedoms of the Charter. New Brunswick has an enormous and grave responsibility. We hope that the suggestions and recommendations we present today will help the government in finding ways to assume fully that responsibility.

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BILL

AN ACT TO BRING ALL NEW
BRUNSWICK LAWS INTO
CONFORMITY WITH SECTION 15 OF
THE CANADIAN CHARTER OF
RIGHTS AND FREEDOMS

PROJET DE LOI

UNE LOI AYANT POUR BUT DE RENDRE
LES LOIS DU NOUVEAU-BRUNSWICK
CONFORMES A L'ARTICLE 15 DE LA
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BILL

AN ACT TO BRING ALL NEW
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RIGHTS AND FREEDOMS

* * *

Whereas section 15 of the Canadian Charter of Rights and Freedoms, with respect to equality guarantees, comes into force on April 17, 1985;

And whereas New Brunswick has undertaken to amend its laws to bring about conformity with the Charter;

And whereas once appropriate changes are made to legislation, it will be important to ensure that regulations and policies reflect these changes;

And whereas for that purpose it is necessary to recognize that equal position of individuals regardless of marital status and the equal position of spouses as individuals within marriage;

1. The government of New Brunswick hereby undertakes to eliminate any discrimination in its legislation and policies that could prevent the citizens of New Brunswick from moving towards equality.

PROJET DE LOI

UNE LOI AYANT POUR BUT DE RENDRE
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CONFORMES A L'ARTICLE 15 DE LA
CHARTRE CANADIENNE DES DROITS ET
LIBERTES

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Attendu que l'article 15 relatif aux droits à l'égalité de la Charte canadienne des droits et libertés prendra effet le 17 avril 1985;

Et attendu que le Nouveau-Brunswick s'est engagé à rendre ses lois conformes aux dispositions de la Charte;

Et attendu qu'une fois que les modifications appropriées auront été apportées à la législation, il sera important de s'assurer que la réglementation et les politiques gouvernementales reflètent adéquatement ces modifications;

Et attendu que dans ce but, il est nécessaire de reconnaître les individus sur un pied d'égalité, sans égard à leur état matrimonial et de reconnaître les conjoints en tant qu'individus égaux au sein du mariage;

1. Le gouvernement du Nouveau-Brunswick s'engage par la présente loi à éliminer toute discrimination pouvant exister dans la législation ou dans les politiques gouvernementales, susceptible d'empêcher les citoyens - citoyennes du Nouveau-Brunswick d'aspirer à l'égalité.

2. The Government of New Brunswick declares that the principle of equality stated in section 15 of the Charter of Rights and Freedoms has priority over all provincial laws with respect to the application and to the effect of the law whether common law or statutory, as well as with respect to the intentions and the wording of the law.

3. (1) For all purposes of the law of New Brunswick, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person.

(3) Without limiting the generality of subsections 1 and 2,

(a) each of the parties to a marriage has the like right of action in tort against the other as if they were not married;

(b) a married woman is capable of acting as guardian ad litem or next friend as if she were an unmarried woman;

2. Le gouvernement du Nouveau-Brunswick déclare que le principe de l'égalité, énoncé à l'article 15 de la Charte canadienne des droits et libertés a priorité sur toutes autres lois provinciales autant dans l'application et les effets de la loi de common law ou statutaire, que dans l'intention et la formulation de la loi.

3. (1) Aux fins de la loi du Nouveau-Brunswick, un homme marié a une personnalité juridique qui est indépendante, séparée et distincte de celle de sa femme et une femme mariée a une personnalité juridique qui est indépendante, séparée et distincte de celle de son mari.

(2) Une personne mariée a la capacité légale et on devra la lui accorder à toutes fins et sous tous les respects comme si une telle personne était une personne non mariée.

(3) Sans restreindre la généralité des paragraphes 1 et 2,

(a) chacune des parties à un mariage a le même droit d'action en préjudice contre l'autre comme si elles étaient non mariées;

(b) une femme mariée est capable de servir de tuteur ou de représentant ad litem comme si elle était une femme non mariée;

(c) the same rules shall be applied to determine the domicile of a married woman as for a married man.

(4) The purpose of subsections 1 and 2 is to make the same law apply, and apply equally, to married men and married women and to remove any difference therein resulting from any common law rule or doctrine, and subsections 1 and 2 shall be so construed.

4. Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

5. (1) No action shall be brought for criminal conversation or for any damages resulting therefrom or from adultery.

(c) les mêmes règlements devront être appliqués pour déterminer le domicile d'une femme mariée comme pour un homme marié.

(4) Le but des paragraphes 1 et 2 est d'appliquer la même loi, et de l'appliquer sur une base égale aux hommes mariés et aux femmes mariées et d'enlever toute différence afférente dérivant de tout règlement ou doctrine du common law et les paragraphes 1 et 2 devront être interprétés ainsi.

4. Lorsqu'une personne est blessée ou tuée par défaut ou négligence d'une autre personne dans des circonstances où la personne est en droit de recouvrer les dommages-intérêts, ou aurait été en droit si elle n'avait pas été tuée, le conjoint, les enfants, les grands-enfants, les parents, les grands-parents, les frères et les soeurs de la personne sont en droit de recouvrer leur perte pécuniaire suite à la blessure ou au décès, de la personne de laquelle la personne blessée ou décédée est en droit de recouvrer ou serait en droit de recouvrer si elle n'avait pas été tuée, et d'intenter une action à ces fins dans une cour ayant la juridiction compétente.

5. (1) Aucune action ne devra être intentée pour conversation criminelle ou pour tous dommages-intérêts en résultant ou de l'adultère.

(2) No action shall be brought by a married person for the enticement or harbouring of the spouse of such person or for any damages resulting therefrom.

(3) No action shall be brought by a married person for the loss of the consortium of his or her spouse or for any damages resulting therefrom.

(4) No action shall be brought by a parent for the enticement, harbouring, seduction or loss of services of his or her child or for any damages resulting therefrom.

6. For the purpose of this law, discrimination due to pregnancy is discrimination based on sex.

7. This law shall come into effect on the 17th of April, 1985.

(2) Aucune action ne devra être intentée par une personne mariée pour la séduction ou l'hébergement du conjoint d'une telle personne ou pour tous dommages-intérêts en résultant.

(3) Aucune action ne devra être intentée par une personne mariée pour la perte de communauté conjugale de son conjoint ou pour tous dommages-intérêts en résultant.

(4) Aucune action ne devra être intentée par un parent pour la séduction, l'hébergement, le détournement ou la déchéance de services de son enfant ou pour tous dommages-intérêts en résultant.

6. Pour les fins de la présente loi, la discrimination en vertu de la maternité est de la discrimination basée sur le sexe.

7. La présente loi entrera en vigueur le 17 avril 1985.